Kentucky General, Inc., d/b/a/ Norman King Electric *and* International Brotherhood of Electrical Workers, Local Union 1701, AFL–CIO. Cases 25–CA–23407, 25–CA–23456–1–2, 25–CA–23467–1–2, and 25–CA–23530

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 7, 1997, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel filed limited exceptions with supporting argument and a brief in support of the judge's decision. The Respondent filed exceptions and a supporting brief and an answering brief to the General Counsel's limited exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order which is modified and set forth in full below to reflect the amended remedy.

The judge found that the Respondent violated Section 8(a)(3) of the Act by refusing to hire or consider for employment six applicants for employment because of their union affiliations. We agree with the judge, for the reasons stated in his decision, but with the following additional observations and modifications.[3] First, we note that the Respondent has not excepted to the judge's finding that it knew of the six applicants' union affiliations and does not argue to the contrary in its brief. Second, although we agree with the judge that the Respondent's professed reasons for hiring the employees it hired instead of the discriminatees were unpersuasive, we do not rely on the subjective nature of the Respondent's hiring process. We do note, in addition to the other factors cited by the judge, that the record contains scant support for the Respondent's claim that it hired Jeff McManaway and Tim Cureton, because it was familiar with their skills and abilities. There is no evidence that either of those men had previously worked for the Respondent, or with its owner and president, Norman King, and King testified only in generalities concerning his asserted knowledge of their skills. We also note that, although the Respondent hired Jeff Jones on the basis of another employee's recommendation, when King told Thaddeus McCormic that he still needed more electricians and asked if he knew any who needed work, King did not pursue the matter further when McCormic said he only knew about union electricians. Thus, even though the Respondent needed additional electricians and was willing to hire nonunion electricians on the recommendation of other employees, it apparently was not interested in obtaining the names of union electricians in the same fashion.

We also adopt the judge's finding that the Respondent unlawfully laid off Robert McBride and Thaddeus McCormic because they engaged in activities protected by Section 7 of the Act. In reaching that conclusion, the judge considered and rejected the Respondent's claim that it selected McBride for layoff because he had previously done a poor job of wiring a control panel, and that it selected McCormic for layoff, because he became upset when another employee was chosen as an acting supervisor rather than McCormic. We agree with the judge that the Respondent's asserted reasons for these layoffs are pretextual. However, we do not rely on his reasoning that the Respondent lacked sufficient knowledge of the extent of McBride's poor workmanship to warrant laying him off, and that McCormic's reaction to being passed over for the position of acting supervisor was not a negative attitude that would justify his selection for layoff, which essentially amounts to a questioning of the Respondent's business judgment.

We rely instead on the other factors cited by the judge and, in addition, on the fact that the discriminatees were not laid off when they first engaged in the conduct relied on by the Respondent, but were let go only after they had engaged in protected picketing. Thus, the Respondent appears to have tolerated their

[1] No exceptions were filed to the judge's dismissal of (1) 8(a)(1) allegations that the Respondent prohibited its employees from talking to union people or contractors, photographed employees engaged in picketing, and advised employees that other employees had been laid off because they filed charges against the Respondent; and (2) 8(a)(3) and (1) allegations that the Respondent assigned employee Robert McBride to an onerous job assignment in order to discourage protected concerted activity.

In affirming the judge's finding that the June 16 interrogation of Robert McBride violated Sec. 8(a)(1), we do not rely on subsequent unlawful conduct by the Respondent. We emphasize instead that the coercive effect of the interrogation was heightened by the fact that it was conducted by the Respondent's highest official, its owner and president, Norman King, and addressed to an individual who was applying for employment with the Respondent.

[2] In adopting the judge's finding that the Respondent unlawfully interrogated employees, Chairman Gould finds it unnecessary to rely on the holdings in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[3] This case arises in the jurisdiction of the United States Court of Appeals for the Sixth Circuit. The judge found, and we agree, that the General Counsel here, met the requirements of the court's test set forth in *NLRB v. Fluor Daniel, Inc*., 102 F.3d 818 (6th Cir. 1996), for finding violations in cases alleging discriminatory refusal to hire applicants for employment. Thus, the record supports a finding that the six applicants found to have been discriminated against had applied for jobs with the Respondent and were qualified for available jobs for which the Respondent was seeking applicants. Despite the applicants' qualifications, they were not hired for antiunion reasons. After refusing to hire these six applicants, the Respondent continued to seek other applicants with the same qualifications for its open positions and hired other applicants for those positions.

conduct until they engaged in protected activity, and only later assertedly relied on that conduct in selecting them for layoff. This inaction gives further support to the judge's finding that the Respondent would not have laid off McBride and McCormic in the absence of their protected activity.[4]

The General Counsel, in its limited exceptions, notes that although the judge specifically found that employees Robert McBride and Thaddeus McCormic were laid off in violation of Section 8(a)(3) and (1) of the Act, the recommended Order does not include a provision for their reinstatement. The General Counsel submits that the judge erred in failing to provide for reinstatement. The Respondent contends that the General Counsel carries the evidentiary burden to establish the likelihood that the Respondent would have continued to have employed the discharged employees after completion of the construction project on which they were working when laid off. The Respondent's argument was specifically rejected by the Board in *Dean General Contractors*, 285 NLRB 573 (1987). There, the Board held that unlawfully discharged construction industry employees are entitled to a presumption that they would have been transferred to other sites after the completion of the project on which they were working. Thus, they receive the traditional make-whole remedy of reinstatement and backpay, leaving to compliance, the determination of any limit on the respondent's liability in either respect. After a careful review of the record, we find that the Respondent has not rebutted the presumption but may attempt to do so at the compliance phase of this proceeding. Id. at 575

Accordingly, we shall modify the judge's recommended Order to require that the Respondent offer Robert McBride and Thaddeus McCormic reinstatement. We shall further modify the Order to conform more precisely to the judge's findings. We shall also modify the notice to conform to the Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Kentucky General Inc., d/b/a Norman King Electric, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating employees about their intentions regarding union activity; implying that the owner would not be pleased by any union activities; admonishing any employee not to drag the Company into a union campaign; implying to employees that it would be futile to support the Union; and telling new employees that the Company had problems with the Union and would not be a union company and hoped the employee was not a union man.

(b) Discriminatorily laying off employees because of and in retaliation for engaging in picketing, union activity, or other protected concerted activities.

(c) Refusing to consider for employment or refusing to employ job applicants for the position of journeyman electrician because they are members or sympathizers of the Union or because they worked in an establishment which had union contracts.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Rodney Albin, Timothy Blandford, Roger Daniel, Jerry Frey, and Alan Rafferty employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent position without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination.

(b) Within 14 days from the date of this Order, offer Robert McBride and Thaddeus McCormic full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Rodney Albin, Timothy Blandford, Roger Daniel, Jerry Frey, Alan Rafferty, Robert McBride, Thaddeus McCormic, and the estate of Jerry Rogers whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files and remove any and all references to the unlawful layoffs and the unlawful refusals to hire and consider for hire the discriminatees named in the complaint and within 3 days thereafter notify the discriminatees in writing that this has been done and

[4] We recognize that, when an employer lays off employees because of lack of work, it has to have some basis for selecting whom to lay off. Thus, it may choose to lay off particular employees on the basis of conduct that, although undesirable, did not warrant their discharge when work was more abundant. In those circumstances, we might not necessarily infer, based on prior inaction, that a layoff is discriminatorily motivated. Here, however, the judge found that the Respondent did not have a convincing reason for laying off two employees at the time McBride and McCormic were let go. Moreover, even though the Respondent hired additional employees after McBride and McCormic were laid off, the two discriminatees were not recalled. In this context, the Respondent's actions regarding McBride and McCormic were in reality discharges, and accordingly it is proper to consider the Respondent's prior overlooking of their claimed shortcomings, in assessing and reject the *Wright Line* defense.

that the layoffs and the refusals to hire and consider for hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Owensboro, Kentucky facilities and all current job sites and mail to all former employees employed at prior job sites, and to named discriminatees, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the named discriminatees, and all current employees and former employees employed by the Respondent at any time since August 18, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating employees about their intentions regarding union activity; implying that the owner would not be pleased by any union activities; admonishing any employee not to drag the company into a union campaign; implying to employees that it would be futile to support the Union; and implying to employees that the company had problems with the Union and would not be a union company and hoped the employees are not union men.

WE WILL NOT discriminatorily lay off employees because of and in retaliation for their engaging in picketing, union activity, or other protected concerted activities.

WE WILL NOT refuse to consider for employment or refuse to employ job applicants for the positions of journeyman electrician because they are members or sympathizers of the Union or because they worked in establishments which had union contracts.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Robert McBride and Thaddeus McCormic reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority rights or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the date of the Board's Order, offer Rodney Albin, Timothy Blandford, Roger Daniel, Jerry Frey, and Alan Rafferty employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Robert McBride and Thaddeus McCormic, and the estate of Jerry Rogers whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL remove from our files any and all reference to the layoffs and the refusal to hire and consider for hire, the individuals named above and notify them in writing that this has been done and that the layoffs, the refusal to hire, or consider for hire will not be used against them in any way.

KENTUCKY GENERAL, INC., D/B/A NORMAN KING ELECTRIC

Steve Robles and *Alonzo Weems, Esqs.*, for the General Counsel.
W. Kevin Smith, Esq., of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Owensboro, Kentucky, on December 9 and 10, 1996. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and the Respondent. The proceeding is based on an initial charge filed August 18, 1994,[1] by International Brotherhood of Electrical Workers, Local Union 1701 (the Union). The Regional Director's consolidated complaint dated September 26, 1995, alleges that Respondent, Kentucky General, Inc. d/b/a Norman King Electric, of Owensboro, Kentucky, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by interrogating employees and employment applicants about their union activities; advising employees that selection of the Union as their collective-bargaining representative would be futile; threatening employees because of their union activity; photographing employees who were engaged in lawful picketing; prohibiting employees from talking with other individuals who were members of the Union; and advising employees that other employees had been laid off because they filed charges under the Act against it and by failing to hire or consider to hire various applicants for employment, by assigned employee Robert J. McBride to an onerous and less agreeable job assignment, and by laying off or terminated McBride and employee Thaddeus McCormic and failing and refusing to recall or reinstate them because of the employees' union and concerted activities and to discourage employees from engaging in these activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as an electrical contractor in the construction industry in the Owensboro area. It annually purchases and receives goods and materials valued in excess of $50,000 from other enterprises in Kentucky each of which purchased and received these goods or services directly from points outside Kentucky. It admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Norman King is the president and owner of Respondent. After working as a journeyman electrician (and union member until he resigned in 1978), King opened the Respondent company approximately 19 years ago. Respondent performs residential, commercial, and industrial electrical maintenance work, generally within a 50-mile radius of Owensboro and it has performed electrical contracting work for Vandenburg Foods (also known as Ragu Foods) in Owensboro for many years. In addition to the Respondent, King operates a separate company, Miles Construction Management. This company performs millwright, iron, and mechanical maintenance work and it shares a building with Respondent.

In June 1994, King secured an electrical maintenance contract to perform work at the Ragu plant, work that involved reestablishing a production line from another Ragu facility and setting up related equipment. The Respondent then had 9 journeyman and 3 helpers but needed about 20 additional electricians and helpers for the project and in early June 1994, King visited the home of alleged discriminatee Robert ''Joe'' McBride. McBride is an electrician with 30 years' experience and a longtime acquaintance of King who had previously worked for Respondent between 1989 and 1993. Toward the end of 1993, Local Union 1701 attempted to organize Respondent's work force and McBride participated in this 1993 organizing effort. King told McBride that Respondent had a big job coming up at Ragu and that he was going to have to hire several electricians and helpers for the job. McBride said he might be interested in returning to work for Respondent and about 2 weeks' later (on about June 16), King returned to McBride's home. McBride asked King whether or not he had hired any additional employees and whether the Ragu project was starting up. King said the project would be starting soon and McBride said he was interested. King then asked what McBride would do if he hired McBride and Local 1701 again attempted to organize the company. McBride said that he would not participate in such an organizing effort. King, without further explanation, responded that that was not the answer he was looking for but he then offered McBride a job beginning June 22, McBride, who then was employed by Allied Electric some 40 miles away in Evansville, Indiana, accepted.

At the end of July, King hired Thaddeus McCormic to work at the same jobsite. Prior to coming to Respondent, McCormic worked as a field supervisor for Abell Electric in Owensboro and at the end of the project, McCormic (who at the time, was not a member of Local 1710 or any other labor organization), was told by an Owensboro city inspector that he might know of a job. McCormic then received a telephone call from Alvin Quisenberry, the Respondent's project superintendent, who asked if he would be interested in working for Respondent. McCormic said he would and on July 28, went to Respondent's facility, and had a conversation with Quisenberry and King. Because it was late in the day, King asked McCormic to return the next day but offered McCormic a job before he left. McCormic returned and completed an application and met with King. They briefly discussed McCormic's work history and King asked McCormic if he knew of any area electricians who needed work because he still needed more. McCormic explained that there were only union electricians on his last job and they were the only electricians he knew in the area. King said that he used to be a member of Local 1701 but had gotten out because the union could do nothing for him. King also said that since then the Union had tried to organize him and that there was no way the Union could get Respondent to sign a contract, that all he had to do was go to negotiations four times in a 1-year period and he would make impossible demands that

[1] All following dates will be in 1994, unless otherwise indicated.

the Union could not meet. King then warned McCormic that union members might approach him on the Ragu job because there were union contractors at that jobsite. It was agreed that McCormic would begin work on August 8. McCormic reported to the Respondent's facility and drove with King to the Ragu plant. King reiterated that there were union contractors on the job, that they would be interested in organizing him and that he did not care whether McCormic became a union member or not but admonished McCormic not to drag Respondent in to the middle of a union campaign.

In early August the Respondent ran the following ad in the Owensboro Messenger-Inquirer which ran for a month:

> ELECTRICIAN & helpers for industrial work. Experienced in controls & installing conduit. P.O. Box 1306, Owensboro, KY 42302.

On August 10, in response to the ad, Roger Daniel and Rodney Albin, who had just been laid off from Wagner-Smith Electric, a well-known union company, applied for employment in person at Respondent's facility. Both are journeyman electricians and members of IBEW Local 1701 and Albin wore an IBEW T-shirt. They asked a secretary if Respondent was still accepting applications for employment and were told ''yes.'' Both men completed and submitted their applications that same morning and, while at the facility met with King. King asked Daniel where he had been working. When Daniel answered King asked who was running the shop for Wagner-Smith. He then left and returned and asked Daniel if he had been getting along with Harold Baggett (Baggett is business agent for IBEW Local 1701). Daniel answers yes and King said that he could never get along with Baggett. King again left the room as Daniel and Albin completed their applications. King returned, began a conversation with Albin and asked Albin if they were planning on causing him any trouble. Albin responded that he was not planning on causing anyone any trouble and they both handed their completed applications to King. King asked Daniel how many people did Local 1701 get an Lark Electric as a result of the Union's successful organizing efforts at Lark and Daniel told him about seven people. King also asked whether they were taken into Local 1701 as journeymen or apprentices and Daniel responded, ''[B]oth.''

As a part of his employment history, Daniel listed Wagner-Smith, Fluor Constructors International and Lark Electric Co. as prior employers. Albin listed Wagner-Smith, Galloway Electric, and Industrial Contractors. These contractors were all known by King to be union companies.

On August 11, Timothy Blandford, Jerry Frey, and Alan Rafferty also applied for employment at Respondent's facility. All are members of Local 1701 and are journeyman electricians. They arrived at Respondent's facility at 3:30 p.m. and asked a secretary if Respondent was still accepting applications and she said, ''[Y]es.'' While Blandford, Frey, and Rafferty were completing applications, King arrived and asked these three applications if they were electricians. They said they were, King left but quickly returned and asked them where they had been working. They told him that they were working for Tri-State Fire Protection at the new post office and said that there was a possibility that they soon would be laid off.

As a part of his employment history on Respondent's employment application, Blandford listed Tri-State Fire Protection, Abell Electric Co., and Dynaelectric, all union companies. Where the application asked for other training and education, Blandford included his apprentice needed training through Local 1701 and he listed his position as secretary on the executive board of Local 1701. Frey listed Tri-State Fire Protection, Dynaelectric, and Sachs Electric as past employers. Similarly, Rafferty listed Tri-State Fire Protection, Dynaelectric, and J. House, Inc. also union companies.

On August 15, Jerry Rogers, a member of Local 1701 and a journeyman electrician, applied for employment at Respondent's facility. Included in his employment history on his completed application are Swanson, Nunn, Stone Webster, and IBEW Local Union 238 in North Carolina. Swanson-Nunn is known by King as a union contractor. Rogers, who is now deceased, served as a business manager with Local Union 238 from 1986 to 1992 and where the application asked for other work experiences and special interests, Rogers included various entries related to the Union.

Blandford subsequently made several calls to Respondent to check on the status of his application but was told each time that King was not in the office. None of these applicants ever received any communications from King after they submitted applications and none were hired or told that or why they would not be hired. The ad continued to run through August and three employees were hired in August and three others in September and October.

On August 13, McBride met with Union Business Manager Baggett and agreed to attempt to organize Respondent's employees and he received some blank authorization cards and copies of Local 1701's constitution and bylaws to distribute to Respondent's employees. On the morning of August 16, at the Ragu jobsite, McBride made an announcement outside the employee breakroom in the presence of McCormic, Manual Bennett (a supervisor), and employees Jeff Turner and Gardner Varbel, that he had made application for membership in IBEW Local 1701 and asked if any of these present were interested in joining him. With the exception of Turner who asked what the IBEW was, none expressed interest. The next day McBride spoke up again and asked electrician helper Tony Wink if he was interested in joining. Wink asked McBride some questions before declining the invitation. Later that day McBride also talked to employee Tim Therber in the breakroom about joining the union. Therber said he had already applied for membership into Local 1701's apprentice program.

On August 18, McBride spoke to employee Gerald Snodgrass about joining the Union. Snodgrass who had worked at Respondent since May 1993, declined because he said he did not want to drag King into it. On August 19, McBride again spoke to McCormic about the Union. Present in the lunchroom at the time were two employees from Miles Construction Management Joe Coghil, a supervisor of Respondent, Gil Therber, Tim Therber, and Tim Cureton. McBride told McCormic that he had an authorization card for McCormic and McCormic took the card, signed it and returned it to McBride when McBride asked the others present if they wanted to sign an authorization card, no one responded. Later this same day, Supervisor Quisenberry informed King that McBride had been passing out authoriza-

tion cards at the jobsite and that McBride had announced that he was joining the union.

In the early evening, as McBride was at home getting supper, King called and asked him to come to the office as he needed to speak with him immediately. McBride arrived and asked King how he was feeling and King responded that he was not feeling very well and said, ''Joe, I can't believe you're doing this to me again.'' McBride said he guess he was. King said that he could not believe what McBride was doing after the discussion they had had on McBride's porch and said, ''[A] man is only as good as his word.'' McBride replied, ''I guess that makes me an S.O.B.'' After an exchange regarding McBride's workmanship on a control panel, King asked McBride why he sat with union employees (from other companies), instead of Respondent's employees. McBride told King that he could sit with whomever he wanted. King asked McBride if he still planned to pursue his union activities and McBride responded that he did. McBride then asked King if he was he going to fire him. King said he did not know what he was going to do and them told McBride to report to work the next day.

Supervisor Manual Bennett, 3 days' later, assigned McBride to work alone in an area above a surge kettle. This kettle operates at approximately 240 degrees in temperature and emits a substantial amount of steam. McBride was assigned to work around this kettle alone. Previously, Ragu managers had warned workers not to work around his boiling product because of its potential danger of belching up.

On August 26, employee Gil Therber spoke with King about a discrepancy regarding his paycheck. During the conversation in King's office, King said that he heard that Therber was trying to get an IBEW ticket. Therber said he was not, and King told Therber that if he wanted to get a card to go ahead but not to hurt Respondent by doing so.

On August 30, around 6:30 in the morning, McBride and McCormic began picketing outside the Ragu plant and continued into the afternoon. They carried signs that read, ''King Electric Unfair to His Employees.'' When they continued the following day, King drove near their location, rolled down his window, asked to see their picket signs, and asked if it was okay for him to take a couple pictures. McBride and McCormic said yes and King photographed them and the signs and left. On September 1, Gil Therber joined McBride and McCormic on the picket line and all three men picketed until September 6 when they ended their picket and went in the Ragu plant. Supervisor Bennett directed them to go to Respondent's facility. This went and spoke with King who told them that their positions had been filled and that he would call them when there was work available. King also asked them what had he been unfair about. McCormic answered that he had violated the National Labor Relations Act and King asked what was the unfair labor practice. McCormic did not elaborate and King asked them if they were seeking union representation and McCormic replied that they were not. Thereafter, McBride, McCormic, and Therber were returned to work on September 8.

Tim Therber, who was hired on August 9, the day he applied, was working as a electrician (although he had 6 years of experience and had wired motors and controls he was not a journeyman, he was hired August 9 at a rate of $9 an hour and was listed as a ''helper''), at the Ragu plant. He testified that in late August when McBride and McCormic began picketing, King had a meeting with all the employees on the job in which King told him he was an open shop and said: ''[T]he guys were picketing because he had not hired union men and the union had filed charges for unfair hiring practices.''

He also testified that he applied at the Respondent's after speaking with his father because they had been working out of town and wanted to work locally. He continued working for the Respondent, except for brief layoffs, until he was laid off in March 1996.

On September 16, King told McBride that work was getting slow and that he had to lay off McBride. No mention was made of recall. This same day King hired Monty Hardman and he was placed with Miles Construction. During a conversation with Hardman, who had limited electrical experience, King told him that a few guys were causing union problems for Respondent. King told Hardman that Respondent was not going to become a union shop, that he hoped Hardman was not a union man. He said that Hardman would work on the mechanical side (with Miles Construction), until a position opened up on the electrical. On October 31 he became an electrical for the Respondent at the Ragu site and worked until he was laid off approximately November 16. McCormic had left the jobsite early on Friday but at the start of the workday the following Monday, September 19, King met McCormic at the gate at the Ragu plant. King told McCormic that he also had to be laid off for lack of work.

On October 19, Gil Therber was working on the mezzanine level at the Ragu plant when Supervisor Ed McMahan informed Therber that they were not getting much done and that it was company policy that Therber was not to talk to union people while on the job. Therber did not respond to McMahan.

On November 3, King informed the employees that there would be a temporary layoff due to Ragu running out of money for the project. Gil Therber testified that later that day, he spoke with King near the breakroom and asked King why was not he laid off at the time McCormic and McBride were laid off and that King replied that Therber had not filed any charges against him. Therber was not subsequently recalled.

III. DISCUSSION

This proceeding involves the layoff or discharge of two union activists and the Respondent's apparent failure to hire union affiliated applicants for its nonunion company, as well as certain related alleged unfair practices including interrogations and certain antiunion statements.

A. *Alleged 8(a)(1) Violations*

On owner King's second visit on June 16, to McBride's home, King discussed the Ragu project, his need for additional electricians and helpers and his interest in having McBride work for him again. King also asked McBride what he would do if Local 1701 attempted to organize Respondent again. McBride answered that he would not participate in any organizing effort and King responded that that was ''not the answer he was looking for'' but offered McBride a job to begin June 22.

Here, the fact that McBride accepted the job that King immediately offered after his question about McBride's future

union activities does not preclude a finding that the interrogation was coercive, especially since the questions were by the Respondent's owner. King's response that McBride's answer was not the one he was looking for does infer that King held reservation about reemploying McBride and implies that King would not be pleased if McBride should chose to exercise his Section 7 rights.

It is well established that ''the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act,'' *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). While, interrogation of employees is not unlawful per se, in determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at all the circumstances. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Under all the circumstances here, especially those noted in *Emery Worldwide*, 309 NLRB 185, 186 (1992), cited by both the Respondent and the General Counsel, I find that King's question and followup remark infers that he would not be please if McBride exercised his rights and it is coercive because it implies a threat of retaliation, see *Frank Leta Honda*, 321 NLRB 482 (1996). In the instant case there also is a history of employer hostility towards the union, King's remarks were contemporaneous with his illegal refusal to hire other union applicants (as discussed below), and, it was followed by illegal retaliatory conduct (as also discussed herein), after McBride in fact did chose to join the Union and to engage in protected union activity. Accordingly, I conclude that the Respondent's interrogation of McBride was coercive and I find that it is shown to be in violation of Section 8(a)(1) of the Act, as alleged.

McCormic testified that in a conversation with King on July 29, as he was completing the job application process, King told him that Local 1701 had tried to organize Respondent but that there was no way IBEW Local 1701 could get Respondent to sign a contract and warned McCormic that he might be approached by union members on the Ragu job. King also said that all he would have to do is to go to contract negotiations four times in a 1-year period and he would make ''impossible demands'' that the union could not meet. Then, on August 8, when King and McCormic were riding together to the Ragu plant, King allegedly said that he did not care whether McCormic became a member of a union or not but admonished McCormic not to drag Respondent in the middle of a union campaign. King testified that he merely told McCormic, as he tells all his new employees, that he is an open shop contractor, that unions have tried to organize him in the past and that people may talk to him about it but he did not address the more specific aspects of McCormic's testimony.

On brief the Respondent makes much of the fact that McCormic's investigatory affidavit doesn't refer to ''making impossible demands'' but says only that King said the Union would be unable to meet Respondent's demands and that another affidavit comment states that King said the union ''couldn't force him into joining''—that all he had to do is negotiate four times, etc., is not logical or sensible and it urges that McCormic's testimony is not credible.

As stated by the Board in *Redway Carriers*, 274 NLRB 1359, 1371 (1985):

> Given the nature of the preliminary investigation, allegations that a witness gave prior contradictory testimony in his affidavit or that the affidavit is a more reliable indication of the truth than the witness' testimony at the hearing should be weighed carefully and with due regard to the context in which the prior statement was made. For example, when a witness testifies to facts which are contained in his investigatory affidavit, a finding of contradictory testimony, i.e., impeachment by omission ordinarily is not warranted unless the context of the affidavit indicates a probability that the facts would have been included in the narrative if they were true. Additionally, due consideration must be given for the fact that in the present case certain words or phrases meant one thing to one witness and a different thing to another.

Here, I find little in McCormic's affidavit or his choice of words that would support an impeachment of his testimony at the hearing and I otherwise find that he testified in a highly direct and believable manner. King on the other hand, addressed his recall of the conversation in an indirect, ambiguous manner with aside references about what he was ''trying to do'' and that he knew not to ''threaten'' or ''interrogate'' anybody. Under these circumstances, I find McCormic's testimony to be more complete and reliable and I credit his recall over that of the Respondent's owner.

Accordingly, I conclude that Respondent's admonishment that McCormic should not drag Respondent in the middle of a union campaign is conduct aimed at restraining the employees rights to engage in union activity and that King's other remarks on July had the effect of conveying the impression that it would be futile to support the Union or engage in protected conduct and I find that both remarks violate Section 8(a)(1) of the Act, as alleged.

On August 19, Supervisor Quisenberry informed King that a control panel was ''messed up,'' that McBride had stood up in the breakroom and announced he was going back into the Union and had been passing out authorization cards at the Ragu plant. King (who then couldn't drive as he was in a back brace because of an accident) called McBride at home after work and told him to report to the shop immediately. He then told McBride, ''I can't believe you're doing this to me again.'' King then asked McBride why did he always sit with the union employees and also asked him whether or not he planned to continue his union activities. King also brought up the subject of the panel and said McBride did not do the job very well but when McBride gave some excuses and asked if he was fired, King said no and told him to come to work the next day.

As discussed above, McBride's subjective reaction (he thereafter began picketing) is not relevant and I otherwise find this second interrogation contains remarks that infer King's displeasure with McBride's union activities. Accordingly, for the same reasons discussed above, I find that they are coercive and in violation of Section 8(a)(1) of the Act, as alleged.

On August 30, when McBride and McCormic began picketing outside the Ragu plant, King asked to see their signs and then asked them if it was okay for him to take a picture of them. When McBride and McCormic said yes, King photographed them and drove away. As pointed out by the Re-

spondent, King obviously knew the two pickets and he expressed a specific interest in their signs. Although he otherwise did not explain or testify as to his reasons for taking the pictures, I find that McBride and McCormic freely gave their permission without being subjected to any apparent coercion and, under these circumstances, I find that the setting does not show a tendency to intimidate or unlawful surveillance. Accordingly, I find that this allegation has not been proven and should be dismissed.

On September 16, when Hardman was applying for a job, King told Hardman that he had been having problems with the Union, that Respondent was not going to become a union company and that he hoped that Hardman was not a union man. These statements imply a threat of retaliation against those who engage in union activity and they violate the Act, as alleged, see the *Frank Leta Honda* case, supra.

Employee Gil Therber testified that on October 18 when he was working on the mezzanine level at the Ragu plant, Supervisor McMahan told him that he wasn't ''getting nothing done'' and that he did not care if Therber was union or nonunion but that it was company policy that Therber was not to talk to union people. McMahan testified that Therber was a good worker but that he noticed all of sudden, a week after he came back from picketing, that he was not at his job area. He looked for Therber and saw him coming from another area where the Respondent was not working. He spoke with King about his observation and King told him to speak with Therber if things did not get better. McMahan again saw Therber talking with someone away from the work area and that he spoke with him and said he did not need to talk so much to other contractors and that he needed to be on the jobsite more, McMahan said he did not specifically mention ''union'' contractors but agreed that at Ragu it was ''hard to know the difference'' (between union or nonunion contractors).

Here, I find McMahan's testimony to be straightforward and believable and I credit his testimony that he did not refer to ''union'' people or contractors, I believe that Therber actually had subjectively ''interpreted'' the remark to mean what he stated because he had been talking to a friend who was with a union contractor. Under these circumstances there is no objective evidence that McMahan gave Therber any prohibition against talking to union people or contractors and I find that no violation of Section 8(a)(1) is proven in this instance.

On November 3, King announced a layoff of eight employees on the Ragu project. Later that day, Therber asked King why he was not laid off at the time McCormic and McBride were laid off. Therber testified that King answered that he was not laid off then because he had not filed any charges against Respondent. King testified that he did not have such a conversation with Therber and that he did not make that remark and added that he ''would never say such a thing.'' He also explained how Ragu had run out of budgeted funds to finish the project and that he selected employees for this reason only.

Based on some of his other testimony, I am not persuade that King ''would never say such a thing''; however, in this particular instance neither am I persuaded that Therber's testimony is trustworthy. There are no corroborative circumstances from which to draw support and, accordingly, I am not convince that the alleged statement was actually made. Under these circumstances, I cannot conclude that the General Counsel has met his burden of proving a violation of the Act and, according, this allegation also will be dismissed.

B. *Failure to Hire*

The Respondent cites the recent decision of the Sixth Circuit in *NLRB v. Fluor Daniel, Inc*., 102 F.3d 818 (1996), which rejected (in part) the Board's decision and analysis in *Fluor Daniel, Inc*., 311 NLRB 495 (1993), and sets forth it own holding that:

> In a refusal to hire case alleging an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act, we hold the General Counsel's prima facie case will consist of proving . . . . that the applicant actually applied for a job and was qualified for a job for which the employer was seeking applicants; despite his qualifications the applicant was not hired; anti-union animus contributed to the decision not to hire an applicant and after his rejection, the position remained open and the employer continued to seek applicants from persons with the applicant's qualifications.

The Respondent further contends that under this prima facie scheme, the General Counsel is required to ''match up'' applicants with available jobs for which they are qualified.

The Board has endorsed a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980); see *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), however, as noted in Administrative Law Judge Daughtery dissenting opinion in the *Fluor Daniel* case, supra, the foundation of Section 8(a)(1) and (3) ''failure to hire'' allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941).

Here, I find that it would be improper for me to rely on a court of appeals decision instead of relevant Board decisions on the issues, see *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984), in which the Board emphasized that ''it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed'' citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). See also *Ford Motor Co*., 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 F.2d 993, 996–1002 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979), and *TCI West, Inc*., 322 NLRB 928 (1997). Accordingly, I shall follow the Board's precedent on the issue and I find that the Board's application of the test set forth in *Fluor Daniel, Inc*., 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein to be controlling. Based on this precedent it is found that a prima facie case for an employer's unlawful refusal to hire a job applicant is established by the General Counsel when (1) an individual files an employment application, (2) the employer refused to hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. Moreover, in order to rebut the General Counsel's prima facie case, the

employer must establish that the applicant would not have been hired absent the discriminatory motive.

Here, the record shows that in June 1994 the Respondent got a contract for a project that was expected to require the services of approximately 20 additional electricians and helpers. It hired some helpers and it sought out and hired McBride in late June and McCormic in late July. It then ran a newspaper ad throughout August seeking experienced electricians and helpers for industrial work. Electricians Daniel and Albin (both then unemployed) answered the ad in person on August 10 and electricians Blandford, Frey, and Rafferty (who all told King they expected to be laid off shortly from their current jobs), personally applied for the jobs on August 11 and electrician Rogers applied on August 15. Blandford made several followup calls but was told only that King was not in his office. None of the electricians received any communication from the Respondent about the job and none were hired.

The record shows that each of these six applicants clearly were identified in their application as union members with their most recent past experience with companies known to be union contractors by the Respondent. Moreover, five of the six had personal conversations with King that clearly demonstrated that he knew of their union affiliations. The record also shows that during this same time period, on June 16, July 29, and August 19, Owner King engaged in other communications with employees that were in violation of the Act (see the discussion in part A, above) and I find that the record clearly shows that the Respondent maintained animus against union activity.

Under these circumstances the mere fact that King's sought out and hired McBride, a known former union member, does not belay Respondent's animus, especially since it was accompanied by unlawful statement that coercively implied that King would not be pleased if McBride engaged in any union activities. Also, it appears that McBride accepted the job because it was closer to home than his then current job.

The fact that the Respondent continued running its ad throughout August and the in-person responses to the applicants, who were all told that the Respondent was still accepting applications, clearly refutes any argument by the Respondent that positions were not available and it is clear from King's own testimony that in June he had 10 to 12 electricians and helpers but needed about 20[2] for the project. In addition to hiring McBride (on June 22), McCormic (August 8), and Gil Therber (hired July 28 to start August 6) as journeyman and Tad Therber as a helper, Tim Cureton (August 16), Jeff Jones (October 21), Alan Hofnagle (October 21), and Jeff McManaway (August 3); Jimmy Stewart (August 8) and Tim Cureton (August 16) were hired as journeymen and several additional helpers also were hired. Moreover, it appears that the electricians on the job worked overtime in August and September, which supports an inference that additional employees were needed.

Here, the General Counsel has persuasively met its traditional burden and, in addition, has present clear evidence which also appears to satisfies the circuit court's requirement in *Fluor Daniel*, supra, inasmuch the six applicants are shown to be qualified for the advertised jobs, they were told applications were still being accepted and several journeymen (and helpers) were hired (some on the day they applied) after the six applicants responded to the ad on August 10, 11, and 15.

The Respondent attempts to justify its failure to contact or hire these applicants by arguing that it did not consider them for employment because their wage history showed earnings which were more than Respondent paid its experienced electricians, because King normally tries to hire a currently unemployed electrician as he will stay longer and because they were already working for other electrical contractors at the time they applied. This latter contention does not explain King's failure to consider Albin and Daniel who informed King that they were not employed at the time they applied at Respondent. Second, King hired McBride, Gil Therber, and Hofnagle while they were still working for other contractors and, moreover, King otherwise testified that the job was to be for only a short duration. It also is shown that King otherwise negotiated some of the wage levels of the electricians he did hire. Under these circumstances it is recognized that factors such as unemployment as in the case of Daniel and Albin (and Blandford, Fray, and Rafferty expected to be laid off), or convenience in commuting distance can influence an applicant's willingness to take a lesser wage than sought or previously held. Here, King made no attempt to negotiate a wage rate and no minimum rate was ever communicated and contrary to the Respondent's argument in this respect, without more, it cannot be presumed, that a union affiliated applicant would automatically be disqualified because of wage expectations and its excuses in this respect appear to be more pretextual and indicative of an unlawful motive for his lack of any consideration then persuasive of any legitimate business reason that would refute the General Counsel's showing. King also explained that he did not hire Rafferty, because his application noted he was restricted to lifting materials of no more than 25 pounds and that spools of wire and unbroken bundles of conduit weight more than that as do a lot of journeyman's tool boxes. Otherwise, however, it appears that the helpers on the job do much of the lifting of spools (and running of cable), that conduit can be separated from its bundle and that King made no further inquiry about the nature of Rafferty's limitation to see if in fact he would not be suitable for the job. In fact, it is not established that King saw this limitation and actually evaluated it in August as a reason for not considering Rafferty's application further.

Otherwise, the record shows that all of the persons King hired between June and October 1994 were hired either before they completed an application or at the same time the applicants completed applications. Here King had the opportunity to speak further with these six applicants. If he intended to consider them he could have asked any questions he had with the applicants at that time but he did not. The Respondent also argues that the hiring criteria King used: past wage rates, likelihood that an employee would leave, King personal familiarity with the applicant's skills or recommendation from another employee were legitimate and not indicative of unlawful motivation. As noted above, however, some of these criteria are suspect, at best, and they otherwise

[2] R. Exh. 5, a list of employees and wage rates in 1994, list 13 journeymen of which 5 (including McBride) had start dates prior to July. It also lists 14 helpers, 5 of which had employment dates in June or earlier and 5 of which were hired in July.

described hiring procedures based on subjective criteria related to Kings personal feelings about their desirability and their reference from his own non-union employees. The practical effect of this procedure allows King to selectively pick a nonunion work force and it precluded the employment of union members (except McBride who otherwise was illegally questioned and warned about engaging in protected activity), as King saw fit.

Here, the record shows that the applicant pursued a pattern or practice by which is systematically ignore or declined to consider any obvious union member and relied on criteria that effectively discounted its public request in newspaper ads for electricians experienced in controls and installing conduit. There is no indication that it hired any electricians at all in response to its publicized ad procedure and, under these circumstances, I fined that the Respondent has failed to persuasively rebut the General Counsel's prima facie showing of unlawful motivation. Accordingly, I find that the General Counsel has met his overall burden and shown that the Respondent's failure and refusal to consider and hire the six discriminatees named above violated Section 8(a)(3) and (1) of the Act, as alleged, see *P.S.E. Concrete Forms*, 303 NLRB 890 (1991).

To the extent that the Respondent argues that it did not need and would not have hired all of the six applicants even if it has chosen to consider these applicants for employment on the Ragu project, the matter of the specific number of jobs is relevant to the compliance stage of this proceeding and does not affect the basic determination of the illegality of its practice inasmuch as these clearly were some jobs available at the time the six applications were ignored.

C. *Other Alleged Violations of Section 8(a)(3)*

On August 22, Supervisor Bennett assigned McBride to work over a surge kettle that emitted a substantial amount of steam when it is operating. McBride had never been assigned to work around his specific kettle alone during any previous time that he had worked for Respondent at the Ragu plant and he asserted that Ragu supervisors had warned workers to avoid workers near this kettle when it was operating because of its potential danger of belching up. This assignment was made 3 days after Supervisor Quisenberry informed King about McBride's passing out authorization cards at the work place and after King has summoned McBride from home to Respondent's facility where King had questioned McBride about his union activity. Inasmuch as the General Counsel has established animus, as discussed above, I find that these facts are sufficient to support an inferences that the change to more onerous work assignment was motivated by McBride's union activities and the burden thus shifts to Respondent to defend its action.

As pointed out by the Court, in *Transportation Management Corp*., supra:

> [A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent asserts that its employees who are routinely assigned to hot, steamy areas of the plant enjoy a relaxed rest break policy and that the assignment, involving running conduit between the surge kettle and wiring the control panel that McBride was working on and it was completed in less than a day. It also points out that McBride made no complaint at the time that the assignment was unsafe or undesirable.

McBride specifically testified that he had never worked ''alone'' near the surge kettle when it was operating which leads to the inference that he had done so before but with a helper. There is no indication that he requested a helper or otherwise raised any problem at the time and inasmuch as the controls and conduit tied into the very control panel that he was working on I find nothing unusual or onerous in the assignment. I find, that the Respondent has shown that it would have taken the same action regardless of incident between King and McBride 3 days' earlier and I conclude that the allegations of this charge have not been proven and should be dismissed.

On September 16, King told McBride that he was being laid off because work was getting slow. The following Monday, September 19, King met McCormic (who had left work at noon the previous Friday) at the gate and had the same conversation.

Both employees had engaged in union activity, including picketing, but had returned to work on September 8 and the timing of their layoff about 1 week later and the animus discussed above, are sufficient to support the inference that the layoff's were illegally motivated. King explained that McBride was chosen for layoff from Respondent because of his poor work on the control panel, and that the work on the panel was sloppy and did not meet McBride's normal high quality. McBride admits that there were problems in completing the control panel but implied that it was because of long hours, short work deadlines, and the lack of equipment needed to best perform work on the panel. Employee Snodgrass testified that in view of Ragu's push to finish the job and the lack of a working ''Brady marker'' to properly prepare the labels for the panel, he thought that McBride performed the job as best he could under the circumstances. Most significantly, at the time King ended McBride's employment, King never raised the subject of the control panel and McBride's performance. He asserts, however, that this poor performance was the reason McBride was selected rather than someone else.

King stated that McCormic was selected for layoff because McCormic became upset when King named Cureton as stand in supervisor instead of naming McCormic and King felt that ''I need people that'll roll with me on my decisions. I don't need people that go against my decision.''

On brief the Respondent also discusses a range of other reasons that allegedly support its selection of McCormic and McBride including: that McBride's control panel was finished that McCormic had just a brief tenure with the company, that the job was a short term project that was ''approaching substantial completion,'' that overtime had been reduced as well as part-time work on its other ''school'' project, and that new employees Hofnagle was hired October 31 because of a prior promise by King to hire Hofnagle when he finished working at another job,[3] that the Com-

[3] Again, this would appear to be contrary to King's policy preference to agree to hire those who were unemployed.

pany's jobs have ''ebbs and flows,'' that Hofnagle worked only 4 days before being laid off that while Jones also was hired October 24 and ''may have performed electrical work from time to time'' he was hired especially to perform programming function and he was not laid off when the project was shut down, and that King had close ties to employees Tim Cureton and Jimmy Stewart, who each has less tenure with the Company than McCormic.

On this record there is no evidence that King knew of the specific detailed allegations of ''sloppy, shoddy, unprofessional 'work' in complete disregard for the interest of the company'' on the control panel at the time he selected McBride for layoff. King testified only as follows:

> A. Alvin Quisenberry, my supervisor, told me that there was a panel that was messed up and that Joe McBride was the one that had did the wiring of it.
>
> Q. Did he tell you what the nature of the problem was?
>
> A. He told me that there was wires that were loose under the screws in the terminal strip, some of the wires were mistagged, in the wrong location, and it was just a very bad cosmetic, it did not look good, a very—you know, the panel was not put together like we'd been used to having or seeing Joe McBride put a panel together.
>
> Q. Did Alvin report to you whether it was functional or non-functional?
>
> A. He said they finally got it to work. He had to stay out there with the engineers and trouble-shoot it and work on it, I'm thinking, an extra—he stayed with it for a lot of hours, just trying to trouble-shoot it and get it up and running to get it to operate.

Quisensberry testified as follows:

> Q. Did you make any report of these problems to anyone?
>
> A. I did report the IQ panel to Mr. King.
>
> Q. And what report did you make to Mr. King?
>
> A. It let the—I let Norman know that we had—you know, there was problems, there was wires that the screws were loose, you know, wires that were terminated under loose screws and not tightened up, and, also that we had problems with the analog wiring that was wrong.

This is the only testimony that relates to any knowledge King had of McBride's panel problem at the time he was selected for layoff and I am not persuaded that King had any further knowledge of the extent or details of McBride's alleged poor workmanship. As discussed above, King spoke with McBride about the control panel on August 18, at the same time he questioned him about Quisenberry's report above McBride's renewed union activities. King told McBride he heard about a ''panel mess up'' and asked him what he was doing. After McBride explained that it was hot and he was working a bunch of overtime, he asked if he was being terminated but King said, ''no'' and had him report back to work the next day.

During the interval between King's discussion with McBride about the control panel and the layoffs of September 16, McBride, McCormic, and Therber began (and ended), their picketing.

McCormic's selection for layoff was said to be because he became upset when he was passed over to be acting supervisor (a position he had previously been given in the supervisor's absence). This would not appear to be a negative attribute (McCormic made no big fuss about it), and it does not appear to be a competing reason to downgrade an employee's value. Accordingly, I am not persuaded that the Respondent would have selected either McBride and McCormic for layoff even in the absence of their recent protected picketing activity.

Moreover, it does not appear that the Ragu customer ran over budget and notified the Respondent that it was going to curtail some of the planned project until a week or two after these two were laid off, just prior to King's announcement on November 3, that there would be temporary layoff for this reason. Accordingly, King's reasons for having two layoffs on September 16 and 19 are not convincing.

Under all these circumstances, I find the Respondent's overall justification for its action to be weak and unpersuasive. Accordingly, I conclude that the Respondent has not shown that it would have selected McBride and McCormic for layoff on September 16 and 19, prior to the customer's decision to curtail some of the project, in the absence of McBride's union activities and McCormic's support thereof and I further conclude that the General Counsel has shown that this conduct violates Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating an employee about his intentions regarding union activity; implying that the owner would not be pleased by any union activities; admonishing an employee not to drag the Company into a union campaign; implying that it would be futile to support the Union; and telling a new employee that the Company had problems with the Union and would not be a union and hoped the employee was not a union man; Respondent has interfered with, restrained, and coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discriminatorily laying off employees because of and in retaliation for engaging in picketing, union activity, or other protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By engaging in a pattern or practice of screening job applicants to determine suspected union sympathizers and refusing to consider applicants for employment based on previous employment with union businesses or for other suspected union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to make employees Robert McBride and Thaddeus McCormic whole for any loss of benefits they may have suffered because of the discrimination practiced against them by their premature layoff by payment to them a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It having been found that the Respondent unlawfully discriminated against job applicants including Rodney Albin, Timothy Blandford, Roger Daniel, Jerry Frey, Alan Rafferty, and Jerry Rogers, based on their suspected union sympathies, it will be recommended that Respondent make such employees whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, supra, with interest as computed in *New Horizons for the Retarded*, supra.[4]

Other considerations regarding the remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991), and *Dean General Contractors*, 285 NLRB 573, 573–574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

[Recommended Order omitted from publication.]

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.